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No. 88-765

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

THANH VONG HOAI,
Petitioner,

v.

THANH VAN VO, THACH DUY NGUYEN, MY-LINH D. SOLAND, NGUYEN THI BACH LUU, THANH VAN VO, SUNTECH SUNOCO, INC., and MICHAEL ARIF,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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THE REPLY BRIEF OF PETITIONER THANH VONG HOAI to RESPONDENT SOLAND'S BRIEF IN OPPOSITION

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REPLY BRIEF OF PETITIONER HOAI

I. MISREPRESENTATIONS

There's a misrepresentation in the opposing brief (OB) of respondent Soland which substantially impacts the arguments and, therefore, must be pointed out. See the statement (p.1) that the district court, on May 8, 1987, "dismissed the complaint as being violative of Rule 8." An examination of the Order (Annex 1, p.1) will reveal that the judge said nothing about Rule 8; he referred to his reasons given from the bench. They do not mention Rule 8. (Ann. 1, p.8) His reasoning, as set out in pp. 13,(bottom) - 15, reveal that his criticism was: pleading "10 separate RICO conspiracies. What you're representing here, you don't have that." He pressed the point, which he had raised from earlier, that there was only one scheme. ("Why isn't that one

scheme as opposed to two?") This was a notion he had clearly been preoccupied with from the outset when he early on began to interrupt argument. He made it clear (bottom p. 14) that he didn't like the "130-some pages" of the complaint and that he "got a little aggravated after the 35th page [of a RICO complaint]." Immediately after he said: "I think this thing has got to be redone and brought into focus as to what you're doing. You do have to set forth the fraud act, your Rico count with particularity, but alleging 10 separate Rico conspiracies with all the repetition involved in that when in fact what you've got is one -- you say two separate conspiracies." He then dismissed and allowed petitioner to orally move to amend within 10 days. Thus, though the motion he granted relied, inter alia, on Rule 8, his

reasoning was that the complaint showed 10 RICO conspiracies where he saw only one. So he immediately decided that there was a single scheme here and that for that reason and not for a Rule 8 reason per se the complaint should be drastically reduced. Since petitioner contends that in so doing the district court judge ignored the law in other circuits, cited in our opening brief, that separately indictable offenses, or elements of those offenses, constitute the RICO predicate acts in many circuits, it is apparent that if we are correct in that contention the error began at the May 8, 1987, hearing and continued thereafter and, indeed, that a good deal of the error we assign afterward was a foregone conclusion once this decision to force the complaint into alleging a single scheme within 35 pages or so was

made. Respondent Soland would have it that he found the complaint so utterly incomprehensible that he threw it out for violating Rule 8 like the treatment accorded many complaints by nuts or "jailhouse" lawyers. As the Court can see, that isn't what happened. The judge merely pre-decided the very issue which has led to this petition, i.e., single scheme a la Superior Oil Company v Fulmer (CA8 1985, 785 F2d 252) as opposed to allowing separately indictable offenses to stand as predicate acts, and then went from there.[1] It misleads to represent to the contrary. The compressed complaint that was ordered by the judge below was just over 35 pages as demanded and, if anything, is simply too sparse. The

[1]It is significant in this regard that the other 6 named defendants all answered this supposedly incomprehensible original brief and it was only after Defendant Soland raised the Rule 8 issue that they joined in.

statement (OB, p. 1, bottom) that its allegations are "complex, rambling, disjointed, and in many cases unintelligible" are inconsistent argumentation, not a statement of the case.

Misrepresentations, not as substantial or prejudicial, continue on p.2. The legal representation alleged by Soland, e.g., was from May 28 to August 18.[2] A legal conclusion about malpractice is obviously not a statement of the case. A more definite statement as to Soland and her involvement was contained in the original complaint as a separate count[3]. Thus when the judge demanded the elimination of such separate counts the

[2]The forgery spoken of was of a false letter of dischage which would have terminated the representation on July 15, were it not a forgery presented after the fact.

[3]Under applicable case law, the remedy for lack of detail is a more definite statement not dismissal.

counts for the lesser of the figures in the schemes, as opposed to the central 4, had to be summarized rather sparingly by comparison. It is thus not accurate to even imply that Soland did not know what was alleged against her.

II. The Pattern Argument

A. Generally

The district judge, from the outset, was taken with the notion that there was only a single scheme alleged and, therefore, no "pattern" of racketeering activity as required. This was the paramount concern of the appellate panel in its questioning during oral argument. In this answer (OB p. 13) Soland says:

> The district judge, in dismissing the case, held that Hoai had alleged one single limited scheme to defraud one victim.

Soland argues that because, as stated in Lipin Enterprises v Lee 803 F2d 322 (CA7 1986), numerous acts of mail and wire

fraud may not have the requisite "underlying" continuity to be a RICO violation, Hoai has not alleged a RICO violation. This contention is confused and erroneous. It reflects the reasoning of the district judge. The pattern requirement is obviously that there must be a pattern. With no continuity there is no pattern. If would be a shortcoming if there were not the continuity, i.e., the connections between the acts, is what the 7th circuit said, not that it would be a shortcoming that there was continuity. Further, Soland blithely ignores that Hoai has alleged many more predicate acts than just fraud, including threats of murder, interference with commerce, extortionate credit transactions and others. While opposing counsel may view the 11th circuit view as aberrant, there clearly is, as we have

shown, a split between the circuits and a need for clarification on this point.[4] With due respect the "single limited objective" idea (OB 13) doesn't apply. The most archetypal mafia activity that prompted the RICO law could be shoehorned into that entirely too abstract and metaphysical definition by a trial judge as eager to do so as this one was. What this Court noted in Sedima v Imrex Co., Inc. 473 US 479 (1985) was that a pattern requires at least two separate acts of racketeering activity. The lower court judge and Soland here appear to interpret that to mean that a pattern requires two separate patterns. In quoting Sedima

[4]In the 9th Circuit, e.g., it is not even required that the predicate acts not be part of the same "criminal episode" in order for them to constitute a pattern. California Architectural Bldg. Prods., Inc. v Franciscan Ceramics, Inc. 818 F2d 1466 (CA9 1987). Also the 11th Circuit: Bank of America Nat'l Trust & Savings Assn. v Touche Ross & Co. 782 F2d 966, 971

Soland only shows what we contend, that the separate acts must be related in some way, i.e., have a common purpose or connecting thread. The district judge seems to be saying that the two-or-more acts must be related and unrelated at the same time. This is simply a rewrite of the effort this Court struck down in Sedima to erect a requirement never intended by Congress that would help judges in avoiding these tough cases, even when they are clearly within the scope of Congress' intent.[5] Such a standard would be no standard at all. Like the requirement of racketeering

[5]Indeed, it would appear that not only is there a split between the circuits here, there is even a split in the Eastern District of Virginia. For Judge Williams, in In re Action Industries Tender Offer 572 F Supp 846 acknowledges that "Each act of criminal activity could be counted as an act of racketeering activity, even if numerous acts arise out of the same scheme. See, e.g., United States v. Witherspoon, 581 F.2d 595, 601-601 (7th Cir.1978)."

injury or that of prior convictions for the predicate acts, it would strike down what Congress intended. We don't presume to tell the Court what it meant, but if plain language means anything, Sedima seems to stand for the proposition that the imposition of such requirements as imposing a "racketeering injury" requirement contradicted not only:

> Congress' self-consciously expansive language and overall approach, ...but also ...its express admonition that RICO is to "be liberally construed to effect its remedial purposes." [473 US at 3286 (quoting P.L. 91-442, Sec. 904(a))
> ...
> The statute's "remedial purposes" are nowhere more evident than in the provision of a private action for those injured by racketeering activity.

B. With Regard To Soland In Particular

Soland argues as if by showing that she personally did not commit all of the predicate acts which constitute the pattern, but only a few, she could avoid

liability. Her argument interweaves arguments from cases with the lesser number of the acts specifically alleged against her as if a reader would not be astute enough to distinguish between the pattern as established by the principal players and her participation in the scheme. She didn't participate in all of the predicate acts. The precise details of her participation were set out in Count V. of the original complaint which is specifically entitled: "COUNT V: RICO: MY LINH SOLAND: AGGRAVATION: AIDING AND ABETTING: ADDITIONAL WIRE FRAUD". The original complaint followed the logical scheme of setting forth the allegations concerning the two peripheral characters, Soland and Arif, in their own separate counts <u>after</u> setting forth the principal scheme and the central players. But if the Court will but read this original

count against Soland it will find it coherent and precise.(App.III (Suppl.) Part F, pp.335-50, Arif, pp.351ff.) She used phone calls from Virginia to the station in D.C. to deceive plaintiff and forward the fraud and extortion as well as independently using two letters to deceive, which are described, on her own. She aided and abetted. She also has her subsection (b) in the general allegation count, Count I. Id. Part C, pp. 170-172. When the judge commanded the elimination of the separate counts, the allegations against Soland had to be summarized in a few lines. But it doesn't follow that She can persuade the court to eliminate the detail by draconian reduction and then get off because the resulting concision eliminates prior detail. If she wanted it she had a more definite statement saying what the details are of

the allegations. Applicable, persuasive authority is in United States v Bronston 658 F2d 920 (1981). The key is, and the allegations against Soland are clear on this, the use of the trust necessarily reposed in an attorney by one led by deceit to believe his interests are being represented to deceive in a manner that creates participation in the pattern of racketeering activity. Though here Soland both participated in the pattern created by others[6] and committed predicate acts on her own. In the matter of Klein 608 F Supp 538 (SC Ind 1985); In re Shargel 742 F2d 61 (CA2 1984).

III.

Ms. Soland states (OB, p. 4) that:

[6]In addition to the well known law on aiding and abetting there is here a specific statutory provision, 18 U.S.C. 2 that provides, with regard to all the federal predicate acts that makes her a principal in the acts of the others.

> this Court's analysis must be confined to determining whether the allegations in the Amended Complaint meet the pleading requirements."

No authority for this ukase is given. Small wonder. Is is transparent that respondent would have the Court believe that if but the defendant can get a judge who is hostile to the Act to order a drastic reduction of the size of the complaint attacking a complicated RICO conspiracy, then he or she can make the prior allegations that gave the necessary detail required in pleading fraud vanish into a memory hole, as if knowledge were thereby wiped from the defendant's brain. This is against the purpose of the rules. Worse, it promotes sandbagging a plaintiff when spirit of the statute and the spirit of the rules are against such tactics. If Ms. Soland wants a more definite statement, she knows where she

can get it and has already seen it.

Respondent Soland cites Wright & Miller Federal Practice and Procedure, Civil, Section 1217 (1969). Perhaps counsel should have looked a little further in the treatise, ibid. at Sec. 1218. He would have found that the courts of today often overlook evidentiary material in a complaint and even have found evidentiary allegations helpful. And that while it is true that occasionally a pleading contains a plethora of detail and fails to connect it together with the result that the defendants cannot decipher the statements that the only remedy is to require repleading. "It always should be borne in mind that the federal rules reflect the judgment that polishing the pleadings by means of motions practice rarely is worth the effort." Further, where as here, the modern practice is

ignored and the court allows such antique practices, forcing the elimination of evidentiary fact, another rule, long since held by this Court, comes into play. "[D]ismissal of a civil case for failure to set out evidential facts can seldom be justified." United States v Employing Plasterers' Assn. of Chicago 347 US 186 (1954) at 188-189. It is clear that what Soland argues, and what was imposed by the lower court, is an outworn concept of pleading as a "maze" which must be threaded just right or Alice shall lose her head.

IV. Enterprise

A similar argument is used to show that there was no enterprise alleged. The allegations in the amended complaint, she points out, are conclusory and, again, we are told, with wonderfully through-the-looking-glass logic, that we can't know

the myriad of detail that was alleged in the original complaint because of the order of May 8, 1987. (Also appealed, but that is ignored in her argument). The old memory hole has got those allegations and you and I are not allowed to know they existed. This isn't law or justice, this is a tragic game, in which the purpose of the Congress in passing the RICO statute is not only being ignored, it is being mocked. A reading of the transcript excerpts from the May 8, hearing, the "reasons from the bench" for the order of that date from which we appeal, reveals that the contention that there was a lack of showing of enterprise was secondary. Once the judge decided to find no pattern of racketeering activity because all was a single scheme, the idea that there was no enterprise shown as was thrown in on the second go round.

Again, we are not in the business of telling this Court what it meant in Sedima but we think Soland's attempt to do so is wide of the mark. In Sedima the Court indicated that the evidence of the pattern and of the enterprise might "coalesce." Most of us would take this plain language to mean that though these are two separate things, the victimized party might come to know of them both through the same series of events, just as a symbol may tell us of two different things in a poem or the sun in summer might tell us both that the day is going to be hot and the solar system is functioning as usual. But this sort of reasoning that we all know was apparently beyond the ken in this instance. That the two things -- enterprise and pattern -- are separate though the evidence of them both coalesce, was understood by the

8th circuit in United States v Lemm 680 F2d 1193 (1982). There, as here, the "enterprise" consisted of a "loose federation of persons involved". id. 497. There it was a fraud ring, though arson was its game instead of phony flooding, extortion and all the other activities alleged of the ring in this case. The Lemm case was in turn cited in Kimmel v Peterson 565 F Supp 476, 495 (ED Pa 1983) where the court addressed the very argument advanced by Soland here, i.e., that the pattern and enterprise are indistinguishable, to which the court replied that such argument "misperceives the nature of both the law and the facts". As that court put it, the enterprise may in this situation "collapse into" the predicate acts. The real test is to ask, as was done in Lemm: If we eliminate, for purposes of

argument, a particular set of predicate acts, will the group go on and continue activity that is illegitimate though not committed through those predicate acts. The answer here is yes. Suppose the wire and mail fraud eliminated. The group still would have gone after Hoai's businesses and their other insurance and real estate scams would have gone on. They were out to get what they could and Hoai just happened into their sights.

Respectfully submitted.

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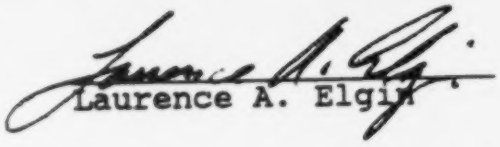
CERTIFICATE OF SERVICE UNDER RULE 28

I hereby certify that I am a member of the bar of this Court (formerly at 2762 Woodley Place, N.W., Washington, D.C. 20008) and that I have served by United States mail, first class, postage

prepaid, this 4th day of January, 1989, true and accurate copies of the foregoing Petition for the Writ of Certiorari, together with the accompanying appendices, 3 copies for each defendant separately represented, upon the following counsel of record below:
Alan Yamamoto, Esquire, 9677 Main Street, Suite B, Fairfax, Virginia 22030; Alan Croft, Esquire, P.O. Box 547, Fairfax, Virginia 22030; Thomas A. Gentile, Esquire, P.O. Box 612, Arlington, Virginia 22216.



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